Supreme Court, U.S.
FILED
MAR 3 1999
CLERK

No. 98-1121

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAVID R. RUIZ, *ET AL.*,
Petitioners,

v.

REPRESENTATIVE JOHN CULBERSON, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Gary L. Johnson, Texas Department of Criminal Justice, Institutional Division; Allan B. Polunsky, Carole S. Young, John R. Ward, John David Franz, Nancy Patton, Carol S. Vance, Patricia Day, Alfred C. Moran, and Alfred M. Stringfellow; and Representative John Culberson and Senator J.E. "Buster" Brown file this Brief in Opposition to the Petition for Writ of Certiorari.[1]

Since Judge William Wayne Justice first held the Texas prison system unconstitutional in 1980, Texas has undertaken the most massive prison restructuring effort in history. Texas has spent billions of dollars constructing new prisons and renovating old

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1. Although the prison official Respondents originally opposed Representative Culberson's and Senator Brown's intervention below, they now support the intervention and join this brief in opposition.

ones. The State has hired and trained thousands of additional guards and other correctional personnel. Under the district court's watchful eye, the prison system restructured and rewrote every conceivable prison policy and procedure to meet not only constitutional standards, but also the latest in accepted correctional practices.

Despite the State's efforts, in the early 1990s Respondents Representative John Culberson and Senator J.E. "Buster" Brown, who served on the corrections committees in their respective branches of the Texas Legislature, perceived that there was little or no movement toward terminating federal court control over the Texas prison system. Abandoning efforts to terminate federal control, then Attorney General Dan Morales in 1992 abruptly agreed to a consent decree that terminated federal jurisdiction over some issues, but left intact federal jurisdiction over numerous other areas of prison management, preventing the state legislature from re-assuming its constitutionally and statutorily guaranteed authority over the state prison system. Frustrated by their perception that the State was not aggressively seeking to end the federal court's pervasive supervision of the prison system, Culberson and Brown turned to Congress for authorization to intervene directly into the *Ruiz* litigation to seek termination of the longstanding injunctive relief.

On April 26, 1996, President Clinton signed into law the Prison Litigation Reform Act, Pub. L. 104-134, Title 8, §802(a), 110 Stat. 1321-66 (codified at 18 U.S.C. §3626). Section 3626(a)(3)(F) of the PLRA, as amended,[2] provides:

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2. Section 3626(a)(3)(F) as originally enacted did not contain the term "including a legislator," and the term "prison facilities" originally read "program facilities."

> Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief, and shall have the right to intervene in any proceeding relating to such relief.

18 U.S.C. §3626(a)(3)(F). On May 21, 1996, less than a month after the PLRA's enactment, Culberson and Brown moved both to intervene in the case and to terminate the 1992 judgment.

The district court took no action on the motion to intervene for eighteen months, effectively blocking the intervention effort during that time. The district court finally entered an order denying the intervention on November 24, 1997, and an order denying Respondents' motion for reconsideration on January 28, 1998. The Fifth Circuit on November 20, 1998, issued its judgment reversing the district court and ordering that Representative Culberson and Senator Brown be permitted to intervene.

ARGUMENT

Representative Culberson and Senator Brown originally sought to intervene in this suit under Rule 24(a) of the Federal Rules of Civil Procedure, which states:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's

ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a). Representative Culberson and Senator Brown asserted that the intervention provision in §3626(a)(3)(F) of the PLRA authorized their intervention under Rule 24(a)(1).[3] Petitioners argued in response that the intervention provision did not apply and, even if it did, permitting the intervention would violate Article III standing requirements.

The Fifth Circuit properly held that Article III does not require intervenors to possess independent standing to intervene in an ongoing case or controversy. *Ruiz*, 161 F.3d at 830. For the reasons that follow, this case does not warrant review by the Court.

I. THE COURT SHOULD DENY THE PETITION BECAUSE, ALTHOUGH THERE IS A CIRCUIT SPLIT, THIS CASE IS NOT THE PROPER VEHICLE TO RESOLVE IT.

A. There Is a Circuit Split.

The primary issue raised by the petition is standing. Respondents acknowledge, as they must, that the circuits are in conflict regarding whether all prospective Rule 24 intervenors must independently demonstrate Article III standing.[4] Because contested

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3. Representative Culberson and Senator Brown also sought to intervene as of right under Rule 24(a)(2) and permissively under Rule 24(b). Because the court of appeals held that their intervention was authorized under Rule 24(a)(1), it never reached those arguments. *Ruiz v. Estelle*, 161 F.3d 814, 827 n.21 (CA5 1998).

4. The Fifth Circuit properly noted that most of the cases cited in footnote 21 in *Diamond v. Charles*, 476 U.S. 54, 68 (1986), were focused primarily on defining Rule 24(a)(2)'s interest requirement. *Ruiz*, 161 F.3d at 831. The court also noted, however, that some of those circuits have subsequently adopted a broader standing requirement. *Id.*

Rule 24(a)(1) interventions are relatively uncommon, the Fifth Circuit is the first court of appeals to address Article III standing in the specific context of a Rule 24(a)(1) intervention. However, the circuits have repeatedly addressed the standing issue in the context of Rule 24(a)(2) interventions.

Most of the courts of appeals to address the issue have found that a party seeking to intervene need not first demonstrate Article III standing. *See Ruiz*, 161 F.3d at 829-33; *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (CA6 1994); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (CA9 1991);[5] *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (CA11 1989); *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (CA2 1978). According to these circuits, once the case or controversy requirement is satisfied by the original parties to the lawsuit, Article III does not require an intervenor to independently demonstrate standing.

The existence of an Article III case or controversy is established by the original parties—not by the intervenor. *Brennan*, 579 F.2d at 190 ("The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor."). Because, by definition, it is the plaintiff who initiates the case and defines the controversy by its complaint, courts have long focused their Article III assessment on the allegations in the plaintiff's complaint. It is the plaintiff, therefore, who must satisfy Article III's case or controversy requirement; and it is the plaintiff

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5. *See also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (CA9 1995) (holding that intervenor appellants need only supply an Article III case or controversy when the original defendants have acquiesced); *Legal Aid Soc'y of Alameda City v. Brennan*, 608 F.2d 1319, 1328 n.9 (CA9 1979) (same); *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 521 (CA9 1979) (holding that Rule 24 intervenor need not have the standing required to initiate suit).

who "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 2317 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The standing doctrine does not exist separate and apart from the case or controversy requirement—rather, it is one of the tests by which courts determine whether the constitutional requirement is satisfied in a given case. Once a plaintiff successfully initiates suit, an Article III case or controversy exists and no further showing is necessary. Requiring an intervenor to demonstrate Article III standing improperly and unnecessarily reopens an issue that has previously been resolved. "Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene." *Chiles*, 865 F.2d at 1212.

In contrast, three courts of appeals have held that a prospective intervenor must demonstrate Article III standing. *See Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 465 (CA7 1998); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (CA8 1996); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (CADC 1994) (per curiam).

The Seventh Circuit, in an opinion authored by Chief Judge Posner, recently reaffirmed its rejection of the majority view. *Doyle*, 162 F.3d at 465 ("A purely ideological interest is not an adequate basis for standing to sue in a federal court—and we require such standing of all would-be intervenors." (citations omitted));[6] *see also People Who Care v. Rockford Bd. of Educ.*, __ F.3d __, 1999 WL 148036, at *6 (CA7 Feb. 8, 1999). In *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 101 F.3d 503, 507 (CA7 1996),

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6. In its Brief in Opposition, the United States failed to acknowledge the Seventh Circuit's broad intervenor standing requirement.

which both *Doyle* and *People Who Care* cited, the Seventh Circuit suggested that its intervenor-standing requirement may be based on prudential considerations: "because intervention can impose substantial costs on the parties and the judiciary . . . the would-be intervenor will not be permitted to push wide the already wide boundaries of Article III standing." *Id.* at 507.

The Eighth Circuit in *Mausolf* expressly rejected prior cases advocating the majority view and adopted a structural view of Article III that requires all parties, including intervenors, to demonstrate standing:

> In our view, an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well.

Mausolf, 85 F.3d at 1300; *see also Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 (CA8 1998). The court believed that the Constitution requires an independent showing of standing and, therefore, declared that Congress lacks authority to permit—by rule or statute—intervention by one who cannot independently demonstrate standing. *Mausolf*, 85 F.3d at 1300.

Finally, the D.C. Circuit also requires a showing of standing. "[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." *City of Cleveland*, 17 F.3d at 1517; *see also Building & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (CADC 1994).

B. The Petition Should Be Denied Because There Are Issues That Cannot Be Resolved in This Case.

Although Respondents cannot adopt the United States' suggestion that Rule 24(a)(2) cases are inapplicable, the United States is correct in asserting that this case cannot resolve the proper interpretation of the term "interest" in Rule 24(a)(2). The Fifth Circuit's holding that Article III does not independently require standing of all intervenors recognizes that Rule 24(a)(2) could be—and has been—interpreted by some courts to require a showing of "interest" similar or identical to a showing of Article III standing. But, although there is considerable disagreement about the scope of the interest an intervenor must prove to satisfy Rule 24(a)(2), *Diamond*, 476 U.S. at 68, the Court cannot decide in this case what interest Rule 24(a)(2) requires because Rule 24(a)(1) does not require that showing.

The Court in *Diamond* declined to decide whether a Rule 24(a)(2) intervenor must demonstrate Article III standing in addition to the general requirements of the Rule, notwithstanding its acknowledgment of the "anomalous decisions" in the courts of appeals. *Id.* at 68-69 ("We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III."). The Court in *Diamond* stated that the focus of the confusion was the "relationship between the interest required to satisfy the Rule and the interest required to confer standing." *Id.*; *see also Ruiz*, 161 F.3d at 830-33.

This case is not a proper vehicle to address the issues left unresolved in *Diamond*. Because this case primarily involves Rule 24(a)(1), the Fifth Circuit properly declined to consider whether proof of standing is mandatory under the "interest" prong of Rule 24(a)(2):

> Like the Supreme Court in *Diamond*, we are not today presented with the proper interpretation of Rule 24(a)(2). Our holding is simply that Article III does not require intervenors to have standing as a matter of constitutional law. Whether intervention under Rule 24(a)(2) requires such a showing, we do not today consider.

Ruiz, 161 F.3d at 832 n.26. Accordingly, the Fifth Circuit left open whether the "interest" required of a prospective intervenor under Rule 24(a)(2) must rise to the level of Article III standing.

The posture of this case prevents it from being a proper vehicle for the Court to fully resolve the circuit split raised by Petitioners. Without an independent standing requirement, nothing in Rule 24(a)(1) mandates or even authorizes an analysis of the prospective intervenor's "interest" in the subject matter of the lawsuit. *Harris v. Reeves*, 946 F.2d 214, 222 n.10 (CA3 1991). When a federal statute grants a right to intervene, the district court simply never reaches the issue of the prospective intervenor's interest in the action. *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1231 n.4 (CA3 1994); *see Blake v. Pallan*, 554 F.2d 947, 951 (CA9 1977) ("Rule 24(a)(2) establishes a four-fold test for intervention of right in those situations not covered by an unconditional statutory right to intervene under Rule 24(a)(1).").

A decision in this case could potentially resolve whether all intervenors must demonstrate Article III standing as a constitutional matter, but it could not address the standing-related interpretation of the "interest" requirement of Rule 24(a)(2), which was left open in *Diamond*. If, for example, the Court were to rule that intervenor standing is not constitutionally required, then the Court would not reach the meaning of "interest" under Rule 24(a)(2) because it is not presented in this case. Even if the Court were to rule that intervenor standing is constitutionally required, the Court would be unable in this case to say whether the "interest" prerequisite in Rule 24(a)(2) requires a similar or more substantial showing than Article III itself.

The Court simply cannot use this case to decide what interest is required by Rule 24(a)(2). Because the overwhelming majority of the cases in which the standing issue arises involve Rule 24(a)(2) interventions, an opinion in this Rule 24(a)(1) case would have relatively little precedential value and is unlikely to put to rest the "anomalous decisions" concerning the interpretation of Rule 24(a)(2).

Petitioners seek the Court's review in order to prohibit Representative Culberson and Senator Brown from exercising their statutory right to intervene in this case. The Fifth Circuit correctly rejected Petitioners' arguments. This case does not present the Court with a meaningful opportunity to address the questions left open by the Court in *Diamond* and, therefore, does not deserve the Court's review.

II. Petitioners' Statutory Construction Arguments Do Not Merit the Court's Review.

Petitioners argue that the Court should grant certiorari to reverse the Fifth Circuit's holding in this case because the PLRA did not grant Representative Culberson and Senator Brown an unconditional right to intervene. Petitioners' argument is two-fold: (1) the PLRA does not grant a right to intervene to individual legislators; and (2) the final judgment does not qualify as a "prisoner release order" under the PLRA. The Fifth Circuit is the first court of appeals to address the interpretation of the PLRA's intervention provision and Respondents are unaware of any other pending litigation in which that provision has been invoked by state legislators. In any event, the Fifth Circuit properly interpreted §3626(a)(3)(F). Without any showing of a circuit split or a question of fundamental importance, the Fifth Circuit's interpretation of the PLRA's intervention provision does not merit the Court's review.

A. The PLRA Grants Representative Culberson and Senator Brown the Right to Intervene.

The PLRA's broad intervention provision grants legislators and certain other officials wide latitude to intervene in prison conditions lawsuits. Specifically, the PLRA grants intervention rights to:

> [a]ny State or local official *including a legislator* or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities . . . .

18 U.S.C. §3626(a)(3)(F) (emphasis added). Petitioners attempt to distort this language and undercut the Fifth Circuit's decision by arguing that this language only permits intervention by the legislature as a whole, or by parties who can act with the full power and authority of the legislature. Pet. 21-22.

Section 3626(a)(3)(F) cannot reasonably be read to exclude an individual legislator's right to intervene. Petitioners attempt to graft onto the language of §3626(a)(3)(F) a requirement that a prospective intervenor have the full authority individually to appropriate funds, but nothing in the text or structure of the statute requires or even supports that reading. The language "jurisdiction or function" does not suggest full, complete, and independent power to appropriate funds. No individual legislator has that authority.

Rather, the only way to give meaning to the statutory language is to read it to include state legislators who are involved in the process of appropriating funds for prisons. For example, it would be natural and appropriate to say that the "jurisdiction and function" of an individual justice of this Court includes hearing and deciding cases, even though only the full Court can actually issue a decision and judgment in a given case. To give any meaning to Congress's express contemplation of legislator intervention, the statute must apply to "a legislator . . . whose jurisdiction or function includes the

appropriation of funds," and that language must, by its common and natural usage, mean individual state legislators whose "jurisdiction or function" includes the power to introduce, amend, and vote on the appropriation of funds for the construction, operation, or maintenance of prison facilities. The Court may not, as Petitioners suggest, adopt a strained interpretation of the statute that reads out as inoperative the very language Congress added to clarify that it intended to permit individual legislators to intervene in prison conditions cases. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

In a case such as this, where the language of the statute is clear, the Court's analysis should begin and end with the language itself. *Hughes Aircraft Co. v. Jacobson*, ___ U.S. ___, 119 S.Ct. 755, 760 (1999). In the face of Congress's plain grammatical intent that the phrase "including a legislator" modify "[a]ny State or local official," Petitioners may not properly seek to equate the term "legislator" with "unit of government," essentially attempting to read legislator standing completely out of the statute. The Court has consistently expressed a deep reluctance to interpret a statute such that one part of it renders another part merely superfluous, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991); *see also Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1976 (1998), and the Court must generally avoid construing one provision in a statute so as to suspend or supersede another provision. *Rake v. Wade*, 508 U.S. 464, 471 (1993). The words "a legislator" cannot be read to be meaningless.

Congress intended to grant individual legislators the right to intervene to protect their legislative interests in part because the typical continuing injunctive provisions in judgments arising in prison litigation severely limit the authority of state legislatures to control the construction, operation, and maintenance of prison facilities. Representative Culberson and Senator Brown are both members of the Texas Legislature whose jurisdiction or function

includes the appropriation of funds for the construction, operation, or maintenance of prison facilities.

Congress intended to give these particular legislators the right to intervene under §3626(a)(3)(F). Congress amended the language of the PLRA to include "a legislator" largely in response to the Fifth Circuit's expressed doubts in this very case about Representative Culberson's and Senator Brown's right to intervene under the prior statutory language. *Ruiz*, 161 F.3d at 820-21. The Fifth Circuit noted that the amendment's sponsor issued a press release stating:

> "I wanted . . .the judges on the Fifth Circuit to know, despite their misinterpretations of Congress' original intent, legislators were meant to have the right to intervene in prison lawsuits, and now that right is explicit. . . . The amendments I sponsored . . . [make] it absolutely clear that Judge Justice must immediately end his unjustifiable blockade of the [Respondents' lawsuit]."

Id. at 820 (quoting press release from the office of Congressman Tom DeLay).

The Fifth Circuit properly held that §3626(a)(3)(F) authorized Representative Culberson and Senator Brown to intervene in this lawsuit. The Court should not revisit the circuit court's decision.

B. The Final Judgment Is Clearly a "Prisoner Release Order" Under the PLRA.

Petitioners also attempt to block Representative Culberson's and Senator Brown's intervention by improperly arguing that the final judgment is not a "prisoner release order" under the PLRA. The Fifth Circuit's analysis is fully consistent with the Eighth Circuit's discussion in *Tyler v. Murphy*, 135 F.3d 594 (CA8 1998), and there is no conflict among the circuits on that issue.

Section 3626(a)(3)(F) permits legislators to intervene "in any proceeding relating to [a prisoner release order]." The PLRA defines a "prisoner release order" to include: "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. §3626(g)(4). The court of appeals properly determined that the final judgment contained specific numerical caps at a number of prisons and a separate system-wide cap that could be avoided only by constructing new prisons—which, of course, Texas has had to do. *Ruiz*, 161 F.3d at 826-27.

Petitioners' argument that the final judgment is not a prisoner release order because it is a consent order "not only flies in the face of both the language of the PLRA and the manifest intent of Congress, but likewise wrenches [*Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501 (1986)] out of context and stands it on its head." *Ruiz*, 161 F.3d at 825. *Firefighters* recognized that consent decrees have characteristics of both contracts and judicial orders and held only that the consent decree at issue was not a prohibited order under §706(g) of Title VII. Nothing in *Firefighters* even remotely suggests that consent decrees are not orders in the general sense. In any event, unlike §706(g) of Title VII, the PLRA clearly considers consent decrees to be orders. 18 U.S.C. §§3626(c)(1), (c)(2)(A), (g)(7), (g)(9); *Ruiz*, 161 F.3d at 825.

Petitioners also wrongly assert that the final judgment is not a prisoner release order because it does not unalterably limit the prisoner population of the entire Texas prison system. The Fifth Circuit explicitly found, and Petitioners do not deny, that the final judgment expressly limits the population of various Texas prisons. *Ruiz*, 161 F.3d at 827; Pet. 24. Further, the final judgment limits the total number of prisoners incarcerated in Texas unless and until

additional prison facilities are built. *Id.* at 827. Under Petitioners' view, no order can be a prisoner release order unless it not only caps prisoner populations, but also prohibits the construction of new facilities. That interpretation is patently unreasonable and is neither suggested nor justified by the language of §3626(g)(4). As the Eighth Circuit properly held in *Tyler*, even a cap on a class of prisoners in a single unit may be a prisoner release order as long as it satisfies the language of §3626(g)(4). *See Tyler*, 135 F.3d at 596-97.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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